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Charles D. Bernholz

University of Nebraska-Lincoln, [cbernholz2@unl.edu](mailto:cbernholz2@unl.edu)

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## The absent American Indian treaties A guide to treaties never referenced at the federal court level

Charles D. Bernholz<sup>1,\*</sup>

*Memorial Library, State University of New York College at Cortland, Cortland, NY 13045, USA*

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I dedicate this note to the seventh grade students of Mike Neal's Native American Studies class at the Tse'Bit'ai Middle School in Shiprock, NM. Their research questions led me to this analysis and to other investigations. I thank them for changing my life in so many ways.

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### Abstract

The treaties signed by the US and the various Indian nations continue to be powerful litigation tools, as demonstrated in the 1999 Supreme Court case *Minnesota v. Mille Lacs Band of Chippewa Indians* (526 U.S. 172). Over the years, many cases have been heard but it is noteworthy that of the over 370 Indian treaties enumerated by the Department of State, more than 80 have never been cited in the opinion of any trial at the federal court level. This note identifies these absent American Indian treaties. © 2001 Elsevier Science Ltd. All rights reserved.

**Keywords:** American Indians; Treaties; Federal court system; Federal Indian law

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A study of treaties constructed between the Indian nations within the borders of the US and the US federal government reveals that many were never discussed in the Supreme Court or in any other court at the federal level<sup>1</sup>. The list of absent treaties is surprisingly long: 84 of these 375 ratified documents have not appeared in the opinions of these courts. This is particularly remarkable because "Indian law is primarily a body of federal law<sup>2</sup>" and the federal courts are the arenas for hearings that pertain to the parameters of

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<sup>1</sup> Charles D. Bernholz is the Collections/Documents Librarian at the State University of New York College at Cortland. His interests include the study of treaties made with the tribes of North America and the examination of the development of federal Indian law in the US and in Canada.

\* Tel.: +1-607-753-5680.

E-mail address: charlesb@em.cortland.edu (C.D. Bernholz).

all treaties. The numerous treaties cited in the 1999 Supreme Court case *Minnesota v. Mille Lacs Band of Chippewa Indians* (526 U.S. 172) is an indication of the intensity of such Indian–US government litigation. Indeed, this case brought for the first time before the Supreme Court two treaties — the *Treaty with the Winnebago, 1837* (7 Stat. 544) and the *Treaty with the Winnebago, 1846* (9 Stat. 878)<sup>3</sup>.

The introduction of these instruments as evidence of Indian-federal negotiations began over 200 years ago when, in *Commonwealth v. Coxe* (4 U.S. 170), the Supreme Court cited for the first time treaties between an Indian nation and the federal government. Three treaties were reported in that opinion: the *Treaty with the Six Nations, 1784* (7 Stat. 15); the *Treaty with the Wyandot, etc., 1785* (7 Stat. 16); and the *Treaty with the Wyandot, etc., 1795* (7 Stat. 49)<sup>4</sup>. Since that time, the federal courts have assessed these negotiated documents and have adjudicated critical issues for the tribes and/or the federal government. Two recent cases may illustrate questions arising from the interpretation of these instruments.

The Miami Nation of Indiana unsuccessfully argued in US District Court<sup>5</sup> that their treaty (*Treaty with the Miami, 1854*; 10 Stat. 1093)<sup>6</sup> supported their claim for recognition by the Department of Interior. Government to government programs for Indians are not available to unrecognized tribes<sup>7</sup>.

In *United States v. Webb*<sup>8</sup>, the defendant asserted “that the alleged acts were not committed within ‘Indian country,’ as that term is defined at 18 U.S.C. § 1151<sup>9</sup>” and that the federal government lacked jurisdiction. In that petition, the US Court of Appeals for the Ninth Circuit was asked “to decide whether the Nez Perce Reservation, established by treaty in 1863, was diminished or disestablished by virtue of the allotment of land to tribal members and the sale of surplus lands to the US for settlement by whites pursuant to the General Allotment Act of 1887, 24 Stat. 388 (the “Dawes Act”)<sup>10</sup>.” The Court concluded that the Reservation had not been diminished or disestablished and denied the motion to dismiss.

These are only two of the numerous suits, brought before the federal court system, which entail aspects of treaty negotiations. The documents that support such actions sustain Cohen’s contention that “Indian treaties continue to constitute a major source of federal Indian law<sup>11</sup>.” It is therefore surprising, given the importance of this material, that more than 20% of these treaties have never been cited in these judicial settings. However, it may be significant that 74 of the 84 treaties noted here were signed before 1850. Cohen has stated that “[t]reaties concluded during the last two decades of the treaty making period ... increasingly encroached upon the autonomy of the tribes<sup>12</sup>.” The remaining 10 documents are a disproportionately small fraction of the more than 100 instruments consummated between 1850 and the end of treaty making in 1871<sup>13</sup>. The imposition of federal authority may have led to the initiation by tribes of federal court actions that concerned, and cited, almost all of these later treaties. In the last century, cases have frequently focussed beyond the issue of sovereignty to those of hunting, fishing, and gathering treaty rights<sup>14</sup>.

The Department of State ratified treaty numbering system<sup>15</sup> affords an index into these treaties. The Department assigned numbers to Indian treaties in chronological order during the processing of these documents, and this sequence included seven pre-Revolutionary

Table 1

Indian treaties listed by Department of State ratified treaty number that have not been referenced in the opinions of any federal court

Department of treaty number	Signatory tribe(s)	Kappler page number or that of other source(s)	Treaty signing date	<i>Statutes at Large</i> citation(s) or an alternative source
1	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Mahican	<i>EAID</i> 9, 103; <i>NY</i> 5, 657	14 Sep 1722	–
2	Cayuga, Onondaga, Seneca	<i>EAID</i> 9, 178; <i>NY</i> 5, 800	14 Sep 1726	
3	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Tuscarora	<i>EAID</i> 2, 77; <i>Franklin</i> 41	4 Jul 1744	
	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Tuscarora	<i>EAID</i> 5, 133; <i>VMHB</i> 154	13 Jun 1752	
	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Tuscarora	<i>NY</i> 6, 853; <i>PA</i> 2, 147	8 Jul 1754	
	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Tuscarora	<i>PA</i> 3, 744	12 Aug 1760	
	Cayuga, Mohawk, Oneida, Onondaga, Seneca, Tuscarora, Shawnee, Delaware, Mingo	<i>NY</i> 8, 111	5 Nov 1768	
19	Cayuga, Oneida, Onondaga, Seneca, Stockbridge, Tuscarora	1027	23 Apr 1792	<i>ASP: IA</i> 1, 232
26	Mohawk	50	29 Mar 1797	7 <i>Stat.</i> 61
28	Oneida	–	1 Jun 1798	<i>ASP: IA</i> 1, 641
30	Chickasaw	55	24 Oct 1801	7 <i>Stat.</i> 65
34	Seneca	62	30 Jun 1802	7 <i>Stat.</i> 72
37	Eel River, Wyandot, Piankashaw, Kaskaskia, Kickapoo	66	7 Aug 1803	7 <i>Stat.</i> 77
44	Wyandot, Ottawa, Chippewa, Munsee, Delaware, Shawnee, Potawatomi		4 Jul 1805	<i>ASP: IA</i> 1, 696
46	Chickasaw	79	23 Jul 1805	7 <i>Stat.</i> 89
52	Piankashaw	89	30 Dec 1805	7 <i>Stat.</i> 100
62	Potawatomi	110	18 Jul 1815	7 <i>Stat.</i> 123
63	Piankashaw	111	18 Jul 1815	7 <i>Stat.</i> 124
64	Sioux: Teton	112	19 Jul 1815	7 <i>Stat.</i> 125
65	Sioux: Mdewakanton	113	19 Jul 1815	7 <i>Stat.</i> 126

(continued on next page)

Table 1 (continued)

Department of State ratified treaty number	Signatory tribe(s)	Kappler page number or that of other source(s)	Treaty signing date	Statutes at Large citation(s) or an alternative source
66	Sioux: St. Peter's River	114	19 Jul 1815	7 Stat. 127
67	Sioux: Yankton	115	19 Jul 1815	7 Stat. 128
68	Omaha	115	20 Jul 1815	7 Stat. 129
74	Iowa	122	16 Sep 1815	7 Stat. 136
79	Sioux: Wahpeton, Wahpekute and Wazikute	128	1 Jun 1816	7 Stat. 143
80	Winnebago	130	3 Jun 1816	7 Stat. 144
87	Oto	139	24 Jun 1817	7 Stat. 154
92	Pawnee: Grand	156	18 Jun 1818	7 Stat. 172
93	Pawnee: Tappage	157	19 Jun 1818	7 Stat. 173
94	Pawnee: Republic	158	20 Jun 1818	7 Stat. 174
95	Pawnee: Loups	159	22 Jun 1818	7 Stat. 175
98	Wyandot	164	20 Sep 1818	7 Stat. 180
99	Peoria, Kaskaskia, Michigamea, Cahokia, Tamaroa	165	25 Sep 1818	7 Stat. 181
107	Kickapoo	182	30 Jul 1819	7 Stat. 200
108	Kickapoo of the Vermilion	184	30 Aug 1819	7 Stat. 202
112	Kickapoo	189	19 Jul 1820	7 Stat. 208
113	Wea	190	11 Aug 1820	7 Stat. 209
114	Kickapoo of the Vermilion	191	5 Sep 1820	7 Stat. 210
116	Creek	195	8 Jan 1821	7 Stat. 215
119	Sac and Fox	202	3 Sep 1822	7 Stat. 223
125	Creek	214	12 Feb 1825	7 Stat. 237
128	Ponca	225	9 Jun 1825	7 Stat. 247
129	Sioux: Teton, Yankton and Yanktonai	227	22 Jun 1825	7 Stat. 250
131	Cheyenne	232	5 Jul 1825	7 Stat. 255
132	Sioux: Hunkpapa	235	16 Jul 1825	7 Stat. 257
133	Arikara	237	18 Jul 1825	7 Stat. 259
134	Minitari	239	30 Jul 1825	7 Stat. 261
135	Mandan	242	30 Jul 1825	7 Stat. 264
140	Oto and Missouri	256	26 Sep 1825	7 Stat. 277
141	Pawnee	258	30 Sep 1825	7 Stat. 279
142	Omaha	260	6 Oct 1825	7 Stat. 282
149	Potawatomi	283	19 Aug 1827	7 Stat. 305
150	Creek	284	15 Nov 1827	7 Stat. 307
151	Eel River	286	11 Feb 1828	7 Stat. 309
157	Delaware	303	3 Aug 1829	7 Stat. 326
166	Wyandot	339	19 Jan 1832	7 Stat. 364
171	Apalachicola	352	11 Oct 1832	7 Stat. 377

(continued on next page)

Table 1 (continued)

Department of State ratified treaty number	Signatory tribe(s)	Kappler page number or that of other source(s)	Treaty signing date	<i>Statutes at Large</i> citation(s) or an alternative source
176	Shawnee, Delaware	370	26 Oct 1832	7 Stat. 397
187	Apalachicola	398	18 Jun 1833	7 Stat. 427
194	Potawatomi	429	10 Dec 1834	7 Stat. 467
195	Potawatomi	430	16 Dec 1834	7 Stat. 468
202	Potawatomi	457	29 Mar 1836	7 Stat. 498
204	Potawatomi	458	22 Apr 1836	7 Stat. 500
205	Potawatomi	459	22 Apr 1836	7 Stat. 501
206	Wyandot	460	23 Apr 1836	7 Stat. 502
210	Sioux: Wabasha	466	10 Sep 1836	7 Stat. 510
212	Potawatomi	470	2 Sep 1836	7 Stat. 513
216	Sac and Fox	474	28 Sep 1836	7 Stat. 517
218	Sioux: Wahpekute, Sisseton and Mdewakanton	481	30 Nov 1836	7 Stat. 527
229	Iowa	500	23 Nov 1837	7 Stat. 547
233	Iowa	518	19 Oct 1838	7 Stat. 568
235	Creek	524	23 Nov 1838	7 Stat. 574
237	Chippewa: Saginaw	528	7 Feb 1839	7 Stat. 578
238	Stockbridge, Munsee	529	3 Sep 1839	7 Stat. 580; 11 Stat. 577
271	Sac and Fox of the Missouri	631	18 May 1854	10 Stat. 1074
315	Arapaho, Cheyenne	807	18 Feb 1861	12 Stat. 1163
339	Sioux: Miniconjou	883	10 Oct 1865	14 Stat. 695
342	Apache, Cheyenne, Arapaho	891	17 Oct 1865	14 Stat. 713
344	Sioux: Two Kettle	896	19 Oct 1865	14 Stat. 723
345	Sioux: Blackfeet	898	19 Oct 1865	14 Stat. 727
346	Sioux: Sans Arcs	899	20 Oct 1865	14 Stat. 731
347	Sioux: Hunkpapa	901	20 Oct 1865	14 Stat. 739
348	Sioux: Yanktonai	903	20 Oct 1865	14 Stat. 735
349	Sioux: Upper Yanktonai	905	28 Oct 1865	14 Stat. 743

War treaties and three later instruments found in *American State Papers: Indian Affairs*<sup>16</sup>. Deloria and DeMallie have recently used this identification system, in part, to disclose the rich array of frequently overlooked materials of the diplomatic endeavors of the Indian nations<sup>17</sup>. In addition, this numbering system has been used to assemble several legal and cultural resources associated with each of the 375 Indian treaties in that Department of State collection<sup>18</sup>.

The Supreme Court compendium<sup>19</sup> will bring together citations of Supreme Court opinions that referred to any of these 375 Indian treaties. This commentary is a much shorter endeavor and specifically identifies those treaties that have *not* been cited at the federal judicial level<sup>20</sup>.

Table 1 is an assembly of:

- The Department of State assigned ratified treaty number of each treaty that has *not* been cited in the opinions of cases at the federal level;
- The name(s) of the participating tribe(s), with an expansion of the “*etc.*” notation — found in many treaty titles in Kappler’s work — into a complete list of parties. For example, ratified treaty number 99, the *Treaty with the Peoria, etc., 1818*<sup>21</sup>, identifies the Peoria as well as the Kaskaskia, Michigamea, Cahokia, and Tamaroa. The signatory lists were augmented in the same manner for the seven pre-Revolutionary War treaties and for the three *American State Papers: Indian Affairs* documents;
- The treaty page number in volume 2 of Kappler’s *Indian Affairs: Laws and Treaties* or the appropriate page in an alternative source(s);
- The treaty signing date according to Kappler’s data or to that of the alternative source(s); and
- The *Statutes at Large* citation(s) for that treaty or a citation to an entry in *American State Papers: Indian Affairs*.

## Appendix

A list of the ratified treaty numbers, titles, and the sources of the seven pre-Revolutionary War treaties and of the ratified treaty numbers and titles of the three *American State Papers: Indian Affairs* instruments. The source abbreviations are used in Table 1.

• Treaty no. 1: *The Great Treaty of 1722 between the Five Nations, the Mahicans, and the Colonies of New York, Virginia, and Pennsylvania*.

*Early American Indian Documents: Treaties and Laws, 1607–1789*, vol. 9, *New York and New Jersey Treaties, 1714–1753*, A.T. Vaughan and B. Graymont, eds. (Bethesda, MD: University Publications of America, 1996): 103–127 (abbreviated as *EAID* 9, 103).

*Documents Relative to the Colonial History of the State of New York*, vol. 5, E.B. O’Callaghan, ed. (Albany, NY: Weed, Parsons, and Co., 1855): 657–681 (abbreviated as *NY* 5, 657).

• Treaty no. 2: *Deed in Trust from Three of the Five Nations of Indians to the King, 1726*.

*Early American Indian Documents: Treaties and Laws, 1607–1789*, vol. 9, *New York and New Jersey Treaties, 1714–1753*: 178–179 (abbreviated as *EAID* 9, 178).

*Documents Relative to the Colonial History of the State of New York*, vol. 5: 800–801 (*NY* 5, 800).

• Treaty no. 3: *A Treaty Held at the Town of Lancaster, By the Honourable the Lieutenant-Governor of the Province, and the Honourable the Commissioners for the Province of Virginia and Maryland, with the Indians of the Six Nations in June, 1744*.

*Early American Indian Documents: Treaties and Laws, 1607–1789*, vol. 2, *Pennsylvania Treaties, 1737–1756*, A.T. Vaughan and D.H. Kent, eds. (Bethesda, MD: University Publications of America, 1984): 77–110 (abbreviated as *EAID* 2, 77).



*Indian Treaties Printed by Benjamin Franklin, 1736–1762*, C. Van Doren and J.P. Boyd, eds. (Philadelphia: The Historical Society of Pennsylvania, 1938): 41–79 (abbreviated as *Franklin* 41).

•Treaty no. 4: *Treaty of Logstown, 1752*.

*Early American Indian Documents: Treaties and Laws, 1607–1789*, vol. 5, *Virginia Treaties, 1723–1775*, A.T. Vaughan and W.S. Robinson, eds. (Frederick, MD: University Publications of America, 1983): 133–146 (abbreviated as *EAID* 5, 133).

The Treaty of Logg's Town, 1752. *Virginia Magazine of History and Biography* 13 (1906): 154–174 (abbreviated as *VMHB* 154).

•Treaty no. 5: *The Albany Congress, and Treaty of 1754*.

*Documents Relative to the Colonial History of the State of New York*, vol. 6, E.B. O'Callaghan, ed. (Albany, NY: Weed, Parsons, and Co., 1855): 853–892 (abbreviated as *NY* 6, 853).

*Pennsylvania Archives*, 1st Series, vol. 2, S. Hazard, ed. (Philadelphia: Joseph Severns, 1853): 147–158 (abbreviated as *PA* 2, 147).

•Treaty no. 6: *At a Conference Held By The Honourable Brigadier General Moncton with the Western Nations of Indians, at the Camp before Pittsburgh, 12th Day of August 1760*.

*Pennsylvania Archives*, 1st Series, vol. 3, S. Hazard, ed. (Philadelphia: Joseph Severns, 1852): 744–751 (abbreviated as *PA* 3, 744).

•Treaty no. 7: *Treaty of Fort Stanwix, or The Grant from the Six Nations to the King and Agreement of Boundary Line — Six Nations, Shawnee, Delaware, Mingo of Ohio, 1768*.

*Documents Relative to the Colonial History of the State of New York*, vol. 8, E.B. O'Callaghan, ed. (Albany, NY: Weed, Parsons, and Co., 1857): 111–137 (abbreviated as *NY* 8, 111).

•Treaty no. 19: *Treaty with the Five Nations, 1792*.

*American State Papers: Indian Affairs*, vol. 1 (Buffalo, NY: William S. Hein and Co., 1998): 232 (abbreviated as *ASP: IA* 1, 232).

•Treaty no. 28: *Treaty with the Oneida, 1798*.

*American State Papers: Indian Affairs*, vol. 1: 641 (abbreviated as *ASP: IA* 1, 641).

•Treaty no. 44: *Treaty between the United States of America and the sachems, chiefs, and warriors, of the Wyandot, Ottawa, Chippewa, Munsee, and Delaware, Shawnee, and Pattawatamy nations, 1805*.

*American State Papers: Indian Affairs*, vol. 1: 696 (abbreviated as *ASP: IA* 1, 696).

## Notes

1. Charles D. Bernholz, *American Indian Treaties and the Supreme Court: A Guide to Treaty Citations from Opinions of the United States Supreme Court*, in preparation.

2. Felix Cohen, *Handbook of Federal Indian Law* (Charlottesville, VA: Michie, 1982).

3. See Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. 2 (New York: AMS Press, 1971): 498–500 and 565–567.

4. Kappler, *Indian Affairs: Laws and Treaties*, vol. 2: 5–6, 6–8, and 39–45, respectively.

5. *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742 (N.D. Ind. 2000).

6. Kappler, *Indian Affairs: Laws and Treaties*, vol. 2: 641–646.



7. “Acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes” [25 CFR § 83.2 (2000): 239]. In 2000, there were “556 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes” [Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, *Federal Register* 65, no. 49 (March 13, 2000): 13298–13303].

8. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), cert. denied (U.S. February 26, 2001) (No. 00-8166).

9. *United States v. Webb*, 219 F.3d 1127, 1128.

10. *United States v. Webb*, 219 F.3d 1127, 1128.

11. Cohen, *Handbook of Federal Indian Law*, 63.

12. Cohen, 69.

13. The legislation to end treaty making is quite concise. See 16 *Stat.* 544, 566.

14. See, for example, *United States v. Dion*, 476 U.S. 734 (1986); *United States v. Winans*, 198 U.S. 371 (1905); and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), respectively. *Winters v. United States*, 207 U.S. 564 (1908) addressed the implied reservation of water rights in an agreement made in 1888 (An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana and for other purposes; May 1, 1888; 25 *Stat.* 113; Kappler, *Indian Affairs: Laws and Treaties*, vol. 1: 261–266). The resulting “Winters doctrine applies to Indian reservations whether created by treaty, agreement, executive order, congressional act, or secretarial order” (Cohen, *Handbook of Federal Indian Law*: 585).

15. *Ratified Indian Treaties, 1722–1869*. Washington: National Archives and Records Service, 1966.

16. The titles of these 10 treaties are listed in Appendix of this note, along with a specific source citation(s) for each. The tribe names, and the abbreviations for the respective treaty sources, are included in Table 1 of this presentation.

17. Vine Deloria and Raymond J. DeMallie, eds., *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (Norman, OK: University of Oklahoma Press, 1999). Deloria and DeMallie state, on p. 182: “Because the State Department files give full status to the later, explanatory treaties that Kappler relegated to mere addenda, the best way to maintain a sense of the diplomatic history of federal involvement with Indian nations is to follow the State Department’s listing.”

18. Charles D. Bernholz, *Kappler Revisited: An American Indian Bibliographic Guide*, in preparation.

19. Bernholz, *American Indian Treaties and the Supreme Court: A Guide to Treaty Citations from Opinions of the United States Supreme Court*, in preparation.

20. Originally, volumes of *Shepard’s Federal Statute Citations* (Colorado Springs, CO: Shepard’s/McGraw-Hill) were used in this note to identify relevant cases. The *Statutes at Large* citation for each treaty was used as the search item in those resources. Unfortunately, the *Court of Claims Reports* (231 volumes; 1863–1982) are incorrectly listed as part of the *Statutes at Large* section of *Shepard’s Federal Statute Citations*. Coverage of *Statutes at Large* citations for the United States Claims Court begins in 1982, with the first volume of the *United States Claims Court Reporter*. Treaties not found in *Shepard’s* were therefore reexamined with the full *Lexis-Nexis* online database to locate documents cited in Claims Court cases before 1982. A total of 74 treaties — plus the seven pre-Revolutionary War and the three *American State Papers* documents — were in neither *Shepard’s* nor the full *Lexis-Nexis* online database. These 84 treaties are reported in this note. I thank Matthew L. Cheney of *Shepard’s* for clarifying the coverage for *Statutes at Large* citations within *Shepard’s Federal Statute Citations*.

21. Kappler, *Indian Affairs: Laws and Treaties*, vol. 2: 165–166.